

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JUANA SAMPLE)	
Claimant)	
V.)	
)	
NEWMAN REGIONAL HOSPITAL)	Docket Nos. 1,067,000
Respondent)	& 1,068,662
AND)	
)	
UNITED WISCONSIN INSURANCE CO.)	
AIG INSURANCE COMPANY)	
Insurance Carriers)	

ORDER

Respondent and insurance carrier, United Wisconsin Insurance Company (United Wisconsin), through Bill W. Richerson, of Overland Park, requested review of Administrative Law Judge Brad E. Avery's April 16, 2015 Award. Timothy J. Pringle, of Topeka, appeared for claimant. Christopher J. McCurdy, of Overland Park, appeared for respondent and insurance carrier, AIG Insurance Company (AIG). The Board heard oral argument on August 11, 2015.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the Award's stipulations. The parties stipulated that the Board may consult the *AMA Guides*¹ (hereafter *Guides*).

ISSUES

This case involves two separately-docketed accidental injuries involving the same claimant and employer, but different insurance companies. Docket No. 1,068,662 concerns a June 30, 2010 injury to claimant's low back. AIG was on the risk. Docket No. 1,067,000 concerns a March 4, 2013 injury to claimant's left hip (trochanteric bursitis). United Wisconsin was on the risk. For the sake of brevity, Docket No. 1,068,662 will be described as the 2010 accidental injury or the first accidental injury and Docket No. 1,067,000 will be called the 2013 accidental injury or the second accidental injury.

For the 2010 accidental injury, the judge awarded claimant a 22.5% whole body functional impairment involving her low back. For the 2013 accidental injury, the judge awarded claimant a 3% whole body functional impairment based on her left hip. The judge awarded future medical treatment in both claims, but specified claimant's need for future medical care resulted from her 2013 accidental injury. Thus, respondent and United Wisconsin were held responsible for claimant's ongoing prescription for Lyrica.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

United Wisconsin requests reversal of the medical portion of the Award, arguing it is not liable to furnish claimant future medical treatment, including her prescription medication Lyrica. Instead, it asserts the more serious injury in the 2010 claim necessitated claimant's need for Lyrica and AIG should be liable. United Wisconsin indicates claimant developed major depression due to the 2010 accidental injury and she would not need Lyrica, but for such diagnosis. Further, United Wisconsin contends the treating physician's opinion (and the judge's conclusion) that claimant needed Lyrica due to the 2013 accidental injury was wrong because claimant was prescribed such medication nearly eight weeks before the 2013 accident. According to United Wisconsin, the treating physician's belief that most of claimant's symptoms from the 2010 accidental injury had resolved before her 2013 accidental injury was incorrect based on claimant's testimony.

Additionally, United Wisconsin argues claimant's need for Lyrica is due to her low back injury and she did not sustain a compensable low back injury as a result of the 2013 accident because no personal injury or physical structural change was identified.

AIG maintains the medical portion of the Award should be affirmed. Like the judge, AIG notes claimant was being weaned off Lyrica before the second accident and claimant's need for such drug was due to new and different symptoms caused by the second accident. With respect to claimant's permanent impairment, AIG argues the treating physician's 20% whole body rating is more credible than claimant's medical expert's 25% whole body impairment rating.

Claimant argues both insurance companies should be held jointly and severally liable for her future medical needs, including the prescription medication Lyrica, and her functional impairment for the first accident should be 25% to the body as a whole.

The issues² are:

1. Is claimant's need for future medical care, including the prescription medication Lyrica, due to her 2010 work injury, her 2013 work injury or both work injuries?
2. What is the nature and extent of claimant's disability?

² United Wisconsin also contended the judge erred in not allowing it to withdraw its stipulation that claimant's 2013 accident was compensable, at least with respect to claimant not having a lesion or change to the physical structure of her low back, pursuant to K.S.A. 2012 Supp. 44-508(f)(1). We view this issue as moot. United Wisconsin never agreed claimant injured her low back in 2013. Claimant did not allege a 2013 low back injury in her application for hearing and both medical experts identified the 2013 accident as involving her left hip. The first accident involved claimant's low back, while the second accident involved her left hip.

FINDINGS OF FACT

Claimant began working for respondent in April 2010 as a registered nurse. She described a June 30, 2010 accidental injury involving her low back:

I went to answer a call light for a patient. Um, when she started to get out of bed, sit up out of bed, um, and reach for her walker, she started to fall back into bed and grabbed my arm - - or my wrist instead, and as she fell back in bed and pulled on my wrist, I braced myself so I wouldn't fall on her. And as that happened, I - - something popped in my back, my left side, and sent some horrible pain down my leg and my back area and my pelvic area. I couldn't move and had to push the call light to have some - - someone come help. And when the aide came in, I had her call the supervisor, and they took me down to the emergency room³

Following the 2010 accident, claimant received extensive medical treatment, including physical therapy, MRIs, a two-level surgical fusion, trigger point injections, epidural injections, a blood patch, a TENs unit and prescription medication.

David Harris, D.O., who specializes in physical medicine and rehabilitation, evaluated and treated claimant for pain management on 21 occasions, the first time on February 28, 2012. Claimant reported achy and sharp pain with a spasm type of pain radiating down the back of her left leg to her ankle. Dr. Harris diagnosed claimant with low back pain and left sacroilitis. Dr. Harris recommended physical therapy and prescribed medication, including Percocet, Tizanidine and Neurontin. He also recommended a left SI joint injection, which was done on March 21, 2012.

On May 8, 2012, Dr. Harris added an additional diagnosis of chronic pain syndrome. Claimant had a second left SI joint injection on July 2, 2012.

On July 23, 2012, claimant complained of persistent pain on her left side, but denied any radicular symptoms past her knee after surgery. Dr. Harris performed a third SI joint injection on August 8, 2012. On August 28, 2012, Dr. Harris referred claimant to a pain psychologist, Dr. Ward, for depression.⁴

On November 20, 2012, claimant reported low back pain which traveled to her left buttock area.

³ R.H. Trans. at 28; see also pp. 17-18.

⁴ Claimant is not making a claim for permanent impairment associated with depression and no qualified medical expert diagnosed her with injury-related depression. Dr. Ward's opinions are not in evidence based on K.S.A. 44-519.

On January 8, 2013, claimant complained of sharp pain down her left leg. Claimant reported dissatisfaction with some of her medications. Dr. Harris prescribed Lyrica to “take out some of the tingling, pins and needles type of pain.”⁵ Claimant testified physical therapy and Lyrica seemed to resolve the pain radiating into her leg.⁶ Seemingly contradictorily, she also testified such treatment and medication caused such symptoms to “go away” and also not go away, but helped.⁷

On February 12, 2013, Dr. Harris noted, “*For unknown reasons her pain was greatly exacerbated last week, then spontaneously,* the other day she turned to go into the elevator at work and felt a pop in her [sacroiliac joint] area and *her pain dramatically improved immediately.*”⁸ Because claimant’s leg pain had “almost all but resolved” or “resolved,” Dr. Harris recommended claimant stop taking Lyrica by gradually decreasing her dosage by one pill a week until she was off the medication.⁹

On March 4, 2013, claimant sustained her second injury. She acknowledged still receiving treatment for the 2010 accident at the time of her 2013 accident and she had not fully recovered from the effects of the first accidental injury. She testified:

I was going to a patient’s room to drop off some paperwork and, um, as I entered the room she was standing up against a - - it’s like a tray, where they eat their lunch, with wheels. She had a catheter on, and she looked - - she was confused. She had the catheter on, and then the catheter bag was clipped to her walker, which was quite a ways from her, so somebody left her unattended. And she just - - I said, “What are you doing, Honey? You’re going to fall.” And she said, “I have to go to the bathroom.” And I said, “Don’t move. I don’t want you to fall.” And she starts scooting and starts falling, so I rushed up to her, put my arms around her so she wouldn’t fall, um, and kind of backed against the wall, yelled for help, put my knee up - - my left knee up under her buttocks so she wouldn’t slide, because she started sliding, just to keep her weight from - - you know, from her falling completely down. And so all her weight was on my leg, and when the nurses came in - - the other nurses came in to help me, you know, they took her off my leg, you know, but all of her weight was on me for a little while, and that caused a lot of pain on my hip and my left leg.”¹⁰

⁵ Harris Depo. at 15.

⁶ R.H. Trans. at 32, 46-47, 52.

⁷ *Id.* at 52.

⁸ Harris Depo., Ex. 1 at 37 (*italics in original*).

⁹ *Id.* at 16, 28.

¹⁰ R.H. Trans. at 10-11.

Claimant returned to Dr. Harris on March 7, 2013, reporting a new accident with a new “rug burn” pain down her left leg.¹¹ Claimant testified the second accident made her symptoms worse and caused new hip pain and a new “burning sensation” or “rug burn feel” down her leg.¹² Dr. Harris recommended claimant continue with therapy and reinitiated Lyrica. Dr. Harris diagnosed her with bilateral sacroiliac joint pain, low back pain, chronic pain syndrome, status post work injury on June 30, 2010, status post new work injury on March 4, 2013 and left lower extremity radiculopathy. Dr. Harris noted:

*It is a different quality, and to some degree pattern of radiation than her previous symptoms. . . . Juana states she has not had the “rug burn” feeling down her leg at any time during her first injury until Monday. The pain before the second injury was numbness and tingling in her left foot. She has a pain on the right and left sides of the low back that radiates down the left leg to the heel of her left foot. She feels her pain is more intense now and radiates up to the head. She states she had a headache yesterday. She states her left leg does not feel like the same feeling she has felt before. Prior to Monday, she was not having any left leg pain.*¹³

Claimant stated Lyrica helped with the burning sensation in her leg. Claimant testified she takes Lyrica for such condition, but she also testified both accidents caused her need for ongoing medication. She acknowledged she took Lyrica for the first accident and it was helping to relieve her symptoms, but Dr. Harris was weaning her off such medication prior to her second accident.¹⁴

Dr. Harris testified it was his intent that claimant be weaned off Lyrica completely, but then she had the second accident. Dr. Harris testified it is possible claimant may require Lyrica for the rest of her life as a result of neuropathy. The doctor supposed it was possible claimant’s depression might perpetuate her pain.

On March 21, 2013, Dr. Harris noted the burning in claimant’s leg had been gone for about three or four days. She was taking Lyrica and Percocet. Claimant had new left iliac crest pain. Dr. Harris provided an additional diagnosis of left greater trochanteric bursitis and stated claimant “did not have this pain before her new work injury on 3/4/13.”¹⁵ Dr. Harris injected claimant’s left trochanteric bursa with cortisone.

¹¹ Harris Depo., Ex. 1 at 40.

¹² R.H. Trans. at 15, 52.

¹³ Harris Depo., Ex. 1 at 40 (italics in original).

¹⁴ R.H. Trans. at 22-23, 46-47.

¹⁵ Harris Depo., Ex. 1 at 47.

On April 18, 2013, claimant complained of throbbing in her left thigh, but no burning sensation. Dr. Harris stated, "Until Juana gets back to where she was before the second injury, the liability should go back to the second injury."¹⁶

In a letter dated May 11, 2013, Dr. Harris stated:

[I]t is my opinion that current treatments provided by the second worker's compensation company should include Lyrica, physical therapy . . . , ongoing workup if indicated, bursa injection and additional doctor visits to such a time as estimated within the next three months that Ms. Sample returns to her initial baseline with symptoms and complaints relating to the injury in 2010.¹⁷

Such letter contained Dr. Harris' mistaken impression that he prescribed claimant Lyrica only after the second accidental injury. In subsequent testimony, Dr. Harris acknowledged his letter was incorrect.

On May 23, 2013, Dr. Harris noted physical therapy made claimant's leg pain better, but her hip was still bothersome. Dr. Harris prescribed a pain patch and ordered additional physical therapy. About one month later, claimant reported continued hip pain, but indicated her pain was no longer radiating down her leg. Dr. Harris placed claimant at maximum medical improvement (MMI) for the left greater trochanteric and iliotibial band syndrome and recommended additional physical therapy for her SI joint.

On August 22, 2013, claimant noted Lyrica and Celebrex were helping. She indicated her leg numbness and pain were gone, which she attributed to physical therapy.

On October 3, 2013, claimant complained of achy, burning and constant back pain. Dr. Harris placed claimant at MMI and referred her to her primary care physician for ongoing medication management.

Dr. Harris assigned claimant a 0% lower extremity impairment for her 2013 work injury. He rejected the 7% lower extremity impairment suggested by the *Guides* because claimant's symptoms were not chronic and had largely resolved. Dr. Harris assigned claimant a 20% whole body functional impairment under the *Guides* for her 2010 work injury. He did not find objective evidence of radiculopathy to suggest higher impairment. He testified claimant's left leg symptoms, whether numbness, tingling or burning, are due to her back injury. Dr. Harris acknowledged claimant suffered no lesion or change in the physical structure of her low back or lumbar spine as a result of the second accident.

¹⁶ *Id.*, Ex. 1 at 44.

¹⁷ *Id.*, Ex. 2 at 3.

On December 15, 2014, Dr. Harris responded to a letter from AIG's counsel regarding whether claimant's need for Lyrica was related to the first or second injury:

In my opinion, . . . although Lyrica was prescribed for symptoms from the initial injury, these had resolved and the Lyrica was no longer necessary. After the second injury, a new and distinct syndrome of neuropathic pain developed to the extent that Lyrica was re-prescribed as an appropriate treatment for those symptoms.¹⁸

Dr. Harris provided similar testimony:

It was based on a few different things, different quality of pain, different location of pain, the fact that the Lyrica had been prescribed but then had been discontinued because the initial symptoms had resolved altogether, the symptoms of the preceding injury. And so all of those spoke to me that any benefits she was getting from the Lyrica was treating the second injury rather than the first.

. . .

Had she not had that second injury, I would not have ever re-prescribed that medication.¹⁹

The following question and answer occurred at Dr. Harris' deposition:

Q. So, Doctor, am I correct in understanding your testimony that any complaints that Ms. Sample is having regarding burning or tingling or numbness going down her left leg are all attributed to her back injury?

A. That is my understanding of her injury, correct.²⁰

At her attorney's request, claimant saw Edward Prostic, M.D., a board certified orthopedic surgeon. Dr. Prostic reviewed medical records, took a history and performed a physical examination. Claimant complained of constant discomfort in her low back, going down her left leg toward her ankle, with numbness and tingling. Claimant told Dr. Prostic her second accident caused her left hip pain. Dr. Prostic diagnosed claimant as having a low back injury with radicular symptoms due to the 2010 accident and trochanteric bursitis due to the 2013 accident.

¹⁸ *Id.*, Ex. 4 at 2.

¹⁹ *Id.* at 27-28, 64.

²⁰ *Id.* at 60.

Dr. Prostic gave claimant a 25% whole body functional impairment for the first accident and an additional 3% whole body functional impairment for the second accident. Dr. Prostic gave claimant light duty and postural work restrictions due to the first accident, which he acknowledged was the more severe injury. He testified claimant's condition was likely complicated by emotional factors and her prior mild seasonal depression turned into major depression some time after her first accident. However, he admitted he was not a mental health expert and the judge sustained objections as to his qualifications to render opinions regarding psychological issues.

Dr. Prostic initially testified claimant's need for future medical treatment was a result of the "two work-related accidents."²¹ In addressing whether claimant's need for Lyrica was the result of the first or second accident, Dr. Prostic testified:

The answer depends upon the level of neurologic symptoms for several months preceding the second accident.

. . .

If the neurologic symptoms were worsened by the accident, then the answer is yes for the second accident. If they were not increased significantly by the second accident, then I would say it's all due to the first.

. . .

I didn't describe her pain when I saw her as burning, but if she describes it as burning now and it wasn't burning before, then the need for Lyrica would be the second accident. If on the other hand she had burning pain that dissipated and it's now the same numbness and tingling that she had before, then the need for Lyrica is from the first accident.²²

After being told that claimant was prescribed Lyrica six to eight weeks before her second accident, Dr. Prostic testified, "[T]he prevailing factor in the need for Lyrica is the first accident."²³ He also stated, "The fact that she had enough leg symptoms to warrant the prescribing of Lyrica indicates she was still having significant nerve symptoms prior to the second accident."²⁴

²¹ Prostic Depo. at 14-15.

²² *Id.* at 19-21.

²³ *Id.* at 22.

²⁴ *Id.* at 23.

However, after reading claimant's testimony that she had ongoing burning pain after the second accident, Dr. Prostic again altered his opinion and testified claimant's need for Lyrica was the result of the second accident. The doctor also testified claimant's need for Lyrica would predominantly be due to the 2010 accident if claimant had a significant decrease in pain from taking such drug before the 2013 accident, but if Lyrica did not provide significant relief before her 2013 accident, her need for Lyrica would be due to the second accident.

Claimant testified she still has spasms down her left leg, numbness and pain affecting her hip, back and sciatic nerve going down her leg. She testified her first accident causes her continuing, constant and daily pain affecting her back, SI joint and left leg. She had left leg numbness, tingling, radicular pain and a pins and needles sensation before her second accident, although she did not know if she would say such symptoms were present immediately before the second accident. She noted her second accident caused new left hip pain and a burning sensation down her left leg. Claimant testified to her belief that she needs Lyrica due to both accidents.²⁵

Relevant to this appeal, the judge awarded claimant: (1) a 22.5% whole body functional impairment for her 2010 accidental injury; (2) future medical treatment upon application and review for her 2010 accidental injury; and (3) future medical treatment for the 2013 accidental injury, including ongoing treatment with Vito J. Carabetta, M.D. The judge specifically found most credible Dr. Harris' opinion that claimant's need for pain medication was due to the 2013 accidental injury.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.²⁶ The burden of proof shall be on the claimant and the trier of fact shall consider the whole record.²⁷

Both K.S.A. 2009 Supp. 44-510h(a) and K.S.A. 2012 Supp. 44-510h(a) state:

It shall be the duty of the employer to provide the services of a health care provider . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

²⁵ R.H. Trans. at 24, 50.

²⁶ K.S.A. 2012 Supp. 44-501b(b).

²⁷ K.S.A. 2012 Supp. 44-501b(c).

Board review of a judge's order is de novo on the record.²⁸ The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.²⁹ The Board, on de novo review, makes its own factual findings.³⁰

ANALYSIS

- 1. United Wisconsin is responsible for claimant's left hip treatment and AIG is responsible for claimant's low back treatment, but both insurance carriers are jointly and severally liable for claimant's Lyrica prescription.**

No party disputes claimant's entitlement to future medical treatment. The dispute concerns which of the two insurance carriers is responsible to pay for claimant's Lyrica. Generally, "insurance carriers should not litigate disputes about their respective liabilities for the compensation awarded to an injured worker in the compensation proceedings. Instead, these matters should be decided in separate proceedings between the carriers brought for such purposes and outside the Board's jurisdiction."³¹ While we could direct the insurance carriers to continue their dispute in a district court proceeding, in *Mitchell*, the Supreme Court of Kansas affirmed a Board assessment of joint and several liability for a worker's medical treatment to two insurance carriers.³²

The evidence is muddled, but supports a finding that claimant's need for Lyrica is due to both accidental injuries.

Claimant testified her need for Lyrica was due to both accidental injuries.

Dr. Prostic provided wavering and equivocal opinions regarding why claimant needed to take Lyrica. Dr. Prostic's testimony can support assigning claimant's need for Lyrica to either accidental injury.

²⁸ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

²⁹ See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

³⁰ See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

³¹ *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 174, 239 P.3d 51 (2010).

³² *Id.* at 170-74.

Dr. Harris' May 11, 2013 letter about the timing of claimant's Lyrica prescription was incorrect. Claimant was clearly prescribed such medication about eight weeks prior to her second accident. After acknowledging such error, Dr. Harris nonetheless indicated claimant needed Lyrica due to her second accidental injury because he was tapering claimant off such drug and her symptoms were new and different after the second accident.

However, there are some problems with Dr. Harris' opinion. He indicated claimant's symptoms from the first injury which caused him to initially prescribe Lyrica had "resolved." Such opinion is incorrect. Dr. Harris was unaware of claimant's testimony that she still had left leg numbness and tingling due to the first accidental injury. Further, Dr. Harris indicated claimant's leg symptoms (burning, tingling and numbness) are due to her back injury. The only back injury occurred in 2010. It is difficult to reconcile Dr. Harris' opinion that her "rug burn" sensation was due to her 2013 hip injury when he indicated her burning pain was due to a back injury. We conclude the best way to harmonize such seeming contradictions is to acknowledge both accidental injuries factor into claimant's need for Lyrica.

Respondent and both insurance carriers are jointly and severally liable for claimant's Lyrica.

3. Claimant proved a 22.5% whole body functional impairment as a result of her 2010 accident.

The Board agrees with the judge's findings on this issue.

CONCLUSIONS

Respondent and both insurance carriers are jointly and severally liable for claimant's Lyrica. We affirm the judge's findings regarding claimant's permanent functional impairment. All other aspects of the judge's Award are affirmed to the extent they are not inconsistent with our conclusions. Claimant's right to future medical treatment is left open in both cases upon application and review and Dr. Vito Carabetta remains the authorized treating physician for the effects of claimant's 2013 accidental injury.

AWARD

WHEREFORE, the Board modifies the April 16, 2015 Award as noted in the "Conclusions" section.

IT IS SO ORDERED.

Dated this _____ day of August, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The treating doctor bluntly stated he would not ever have re-prescribed claimant Lyrica, but for her 2013 accidental injury. United Wisconsin should pay for such drug.

BOARD MEMBER

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Honorable Brad E. Avery